IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

In re:	)	
	)	
TRISM, INC., et al.,	)	Case No. 01-31323-JWV
	)	
Debtors.	)	
	)	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 03-04631
	)	
DISCOVERY MANAGERS, LTD. and UNITED STATES FIDELITY AND GUARANTY CO.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This matter comes before the Court on a motion for summary judgment[1] filed by the Official Committee of Unsecured Creditors ("Committee") and a cross-motion for summary judgment filed by Defendant Discovery Managers, Ltd. ("Discover"). Both motions seek summary judgment on the specific issue of whether certain proceeds of a letter of credit established by the Debtor for the benefit of Discover are property of the bankruptcy estate.

Upon review of the pleadings and relevant law, the Court determines that the proceeds of the letter of credit are not property of the estate, and will grant Discover's cross-motion for summary judgment on that issue.

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[1] As the Court was preparing this Memorandum Order, the Plaintiff filed a motion for leave to file a second amended complaint (although it is the *first* amendment), a motion for leave to file a first amended motion for summary judgment, and a request for a hearing on all of the outstanding matters. However, because the proposed amended motion for summary judgment also seeks a determination of whether the undisbursed or improperly paid funds are property of the estate, the Court believes that a ruling on this issue is still appropriate.

I. STANDARD OF REVIEW

Summary judgment is appropriate when the matters presented to the Court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L .Ed. 2d 265 (1986). The party moving for summary judgment has the initial burden of proving that there is no genuine issue as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 161, 90 S. Ct. 1598, 1611, 26 L. Ed. 2d 142 (1970). Once the moving party has met this initial burden of proof, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, and may not rest on its pleadings or mere assertions of disputed facts to defeat the motion. *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 89 L. Ed. 2d 538 (1986) (stating that the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts"). The mere existence of a scintilla of evidence in support of the opposing party's position will not be sufficient to forestall summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In ruling on a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

II. BACKGROUND

Prior to filing bankruptcy, the Debtor, Trism, Inc. ("Trism") obtained certain transportation liability insurance policies ("Policies") issued by United States Fidelity and Guaranty Co. ("USF&G"). Discover is an agent of USF&G. The Policies contain certain endorsements entitled "Endorsement for Motor Carrier Policies of Insurance For Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" ("Endorsements"). The Endorsements provide that USF&G remains liable under the Policies notwithstanding the Debtor's bankruptcy. The Policies and the Endorsements also obligate USF&G to pay claims under the Policies from the first dollar of each loss for an unlimited number of accidents up to the policy limits. In connection with the Policies, USF&G and Trism entered into a written indemnity

agreement ("Indemnity Agreement") dated November 1, 1995, whereby Trism agreed to indemnify USF&G against loss for, *inter alia*, USF&G's liability for Trism's self-funded retention obligations under the Policies, and to provide letters of credit to USF&G to fund Trism's obligations under the Indemnity Agreement. Accordingly, Trism obtained and delivered to USF&G an irrevocable and unconditional letter of credit from Chase Manhattan Bank in the amount of $6,000,000 with USF&G as the beneficiary ("LOC"). Under the Indemnity Agreement, Trism also was obligated "to investigate, adjust, defend and/or settle all claims."

Then, in a letter dated July 30, 2001, Trism's executive vice president and general counsel, Ralph S. Nelson, notified Discover that Trism could not continue handling claims and that Discover should draw down the entire amount on the LOC and assume responsibility for "the open and settled but unpaid claims, the costs of continuing investigation and defense of those claims." In accordance with the instructions provided by Trism, Discover drew down the entire amount of the LOC on August 6, 2001, and assumed responsibility for adjusting claims under the Policies.

On December 18, 2001, Trism filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and on August 4, 2003, this Court confirmed Trism's plan of reorganization. Discover has continued to adjust claims under the Policies throughout Trism's bankruptcy.

III. DISCUSSION

Both parties recognize that proceeds of a letter of credit are generally considered not to be property of a debtor's bankruptcy estate. *See, e.g., Kellogg v. Blue Quail Energy, Inc.* (*In re Compton Corp.*), 831 F.2d 586, 589 (5th Cir. 1988) ("It is well established that a letter of credit and the proceeds therefrom are not property of the debtor's estate under 11 U.S.C. § 541."). Nevertheless, the Committee argues that if it proves that Discover holds undisbursed proceeds from the letter of credit (or that Discover paid claims or incurred expenses in contravention of Discover's contractual, statutory, or common law obligations), those proceeds are property of the bankruptcy estate. For support, it relies on *Papio Keno Club, Inc., v. City of Papillion* (*In re Papio Keno*), 247 B.R. 453 (B.A.P. 8th Cir. 2000). The Court disagrees.

In *Papio Keno*, the debtor entered into a contract with the City of Papillion, Nebraska ("City")

to operate a lottery in the City. Under the contract, the debtor was required to maintain a cash reserve in an amount not less than the maximum prize possible in the lottery. The City had the right to draw from a letter of credit established by the debtor to fund the cash reserve in the event the debtor failed to fund it, and that is, in fact, what subsequently occurred.. When the contract was terminated by the City, there were funds remaining in the cash reserve, but the City refused to turn them over, despite a provision in the contract that any money remaining in the cash reserve would revert to the debtor upon termination. After filing bankruptcy, the debtor brought an action against the City to recover the balance in the cash reserve.

The court in *Papio Keno* held in favor of the debtor (on this issue) by carving out a narrow exception to the general rule that proceeds of a letter of credit are not property of the estate. Specifically, *Papio Keno* held that the debtor had an interest in proceeds of a letter of credit where (1) the debtor had an obligation to reimburse the bank issuing the letter of and (2) the underlying contract gave the debtor a specific right to a refund of the cash reserve which had been funded by the letter of credit. *Id*. at 459-460.

The narrow exception carved out by *Papio Keno* does not apply to this case, based on the undisputed facts set forth in the parties' pleadings. First, Trism did not have an obligation to reimburse the bank – Trism had already fully funded the letter of credit. Second, Trism did not have a specific contractual right to a refund of the proceeds of the letter of credit – neither the Policies nor the Indemnity Agreement specifically provided such a right. In all likelihood, the parties never contemplated a return of excess proceeds since Discover was only supposed to draw down on the letter of credit to the extent it needed funds to pay claims on the Debtor's behalf. It was only as a result of Trism's letter directing Discover to draw down the entire $6,000,000 on the letter of credit and take over the processing of claims that Discover held the (allegedly excess) proceeds of the letter of credit. And even if the Indemnity Agreement could be construed to imbue Trism with a right to excess proceeds, the Court finds that Trism repudiated, or at least breached, the Indemnity Agreement when Trism abdicated its obligation to process claims.

It is important to note that the Court's holding here does not comment on or affect any right of Trism or the Committee to pursue causes of action against Discover for the acts alleged in the Committee's

complaint;[2] this holding only means that those causes of action cannot be based on a claim to the proceeds of the letter of credit as an asset of the bankruptcy estate.

Therefore, it is **ORDERED** that the motion for partial summary judgment filed by Plaintiff Official Committee of Unsecured Creditors is hereby DENIED. It is

FURTHER ORDERED that the cross-motion for partial summary judgment filed by Defendants Discovery Managers, Ltd., and United States Fidelity and Guaranty Co. is hereby GRANTED. It is

FURTHER ORDERED that the Plaintiff's motion for leave to file a first amended motion for summary judgment is hereby DENIED as moot. It is

FURTHER ORDERED that the Committee' s motion for leave to file a first amended complaint is hereby DENIED. It is

FURTHER ORDERED that, in light of the findings herein, the Plaintiff shall have 20 days from the entry of this order within which it may seek to further amend the complaint.

SO ORDERED this 12th day of November, 2004.

/s/ Jerry W. Venters
HONORABLE JERRY W. VENTERS
UNITED STATES BANKRUPTCY JUDGE

A copy of the foregoing was mailed
electronically or conventionally to:
Joel Pelofsky
Paul Sinclair

[2] Although the Court was not specifically asked to rule on this issue, we would note our holding here also precludes any action against Discover for turnover or for violation of the automatic stay inasmuch the alleged improper acts did not involve actions against property of the estate.